

**NO. PD-0064-20**

**IN THE COURT OF CRIMINAL APPEALS  
AUSTIN, TEXAS**

FILED  
COURT OF CRIMINAL APPEALS  
8/14/2020  
DEANA WILLIAMSON, CLERK

---

---

**JUAN CARLOS FLORES, Appellant**

**v.**

**THE STATE OF TEXAS, Appellee**

---

---

**ON APPEAL FROM CAUSE NUMBER 05-19-00034-CR  
IN THE FIFTH COURT OF APPEALS,  
AFFIRMING THE CONVICTION IN CAUSE NUMBER 067724,  
FROM THE 59<sup>TH</sup> DISTRICT COURT OF GRAYSON COUNTY, TEXAS**

---

---

**APPELLEE'S REPLY TO PETITION FOR DISCRETIONARY REVIEW**

---

---

KARLA BAUGH  
ASSISTANT CRIMINAL DISTRICT ATTORNEY  
GRAYSON COUNTY, TEXAS  
200 S. CROCKETT ST.  
SHERMAN, TX 75090  
903/813-4361  
903/892-9933 (fax)  
*baughk@co.grayson.tx.us* (email)  
TEXAS BAR NO. 01923400

**ATTORNEY FOR THE STATE**

**ORAL ARGUMENT NOT REQUESTED**

## LIST OF JUDGES, PARTIES & COUNSEL

### TRIAL JUDGE:

HON. RAYBURN M. NALL

59<sup>TH</sup> DISTRICT COURT  
GRAYSON COUNTY, TX

### APPELLATE PANEL:

HON. DAVID BRIDGES  
HON. ERIN A. NOWELL  
HON. BILL WHITEHILL

FIFTH COURT OF APPEALS  
DALLAS, TX

### APPELLANT:

JUAN CARLOS FLORES

### ATTORNEY FOR APPELLANT AT TRIAL, ON APPEAL & PDR:

JEROMIE ONEY  
BAR NO. 24042248

P.O. BOX 2040  
GAINESVILLE, TX 7241

940/665-6300  
FAX: 940/665-6301

*jeromie.oney@thesolawfirm.com*

APPELLEE:

THE STATE OF TEXAS

ATTORNEY FOR THE STATE:

ON APPEAL

KARLA BAUGH  
BAR NO. 01923400

ASSISTANT  
CRIMINAL  
DISTRICT  
ATTORNEY

GRAYSON  
COUNTY, TEXAS

200 S. CROCKETT  
SUITE 100  
SHERMAN, TX  
75090  
903/ 813-4361  
903/ 892-9933 (FAX)

*baughk@co.grayson.tx.us*

ELECTED OFFICIAL

J. BRETT SMITH  
BAR NO. 00792841

CRIMINAL  
DISTRICT  
ATTORNEY

GRAYSON  
COUNTY, TEXAS

200 S. CROCKETT  
SUITE 100  
SHERMAN, TX  
75090  
(903) 813-4361  
903/ 892-9933 (FAX)

*smithb@co.grayson.tx.us*

AT TRIAL

MATTHEW  
ROLSTON  
BAR NO. 24058080

ASSISTANT  
CRIMINAL  
DISTRICT  
ATTORNEY

GRAYSON  
COUNTY, TEXAS

200 S. CROCKETT  
SUITE 100  
SHERMAN, TX  
75090  
903/ 813-4361  
903/ 892-9933 (FAX)

*rolstonm@co.grayson.tx.us*

## TABLE OF CONTENTS

LIST OF JUDGES, PARTIES & COUNSEL .....	ii
TABLE OF CONTENTS .....	iv
INDEX OF AUTHORITIES .....	1
STATEMENT REGARDING ORAL ARGUMENT .....	2
STATEMENT OF THE CASE .....	3
STATEMENT OF PROCEDURAL HISTORY .....	3
ISSUES PRESENTED .....	4
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	6
 <u>RESPONSE POINT 1: THE APPELLATE COURT DID NOT ERR IN FINDING THE EVIDENCE SUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT THE WEAPON USED OR EXHIBITED IN THIS CASE WAS A DEADLY WEAPON.</u> .....	
A. FACTS ADDUCED AT TRIAL .....	7
B. RULING BY THE FIFTH COURT OF APPEALS .....	9
C. SUFFICIENCY OF THE EVIDENCE REGARDING A DEADLY WEAPON FINDING UNDER <i>MCCAIN</i> .....	12
D. APPELLATE COURT PROPERLY APPLIED <i>MCCAIN</i> IN THIS CASE .....	15
PRAYER .....	19
CERTIFICATE OF SERVICE .....	19
STATE'S CERTIFICATE OF COMPLIANCE .....	21

## INDEX OF AUTHORITIES

### Federal Cases:

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) .....	17
--	----

### State Cases:

<i>Adame v. State</i> , 69 S.W.3d 581 (Tex. Crim. App. 2002) .....	11
<i>Bailey v. State</i> , 38 S.W.3d 157 (Tex. Crim. App. 2001) .....	14
<i>Blain v. State</i> , 647 S.W.2d 293 (Tex. Crim. App. 1983) .....	14
<i>Brown v. State</i> , 716 S.W.2d 939 (Tex. Crim. App. 1986) .....	13
<i>Flores v. State</i> , 05-19-00034-CR, 2019 WL 6907076 (Tex. App.—Dallas Dec. 19, 2019, pet. granted) .....	9, 10, 11
<i>Hernandez v. State</i> , 332 S.W.3d 664 (Tex. App. – Texarkana 2010) .....	15
<i>Johnson v. State</i> , 509 S.W.3d 320 (Tex. Crim. App. 2017) .....	14
<i>McCain v. State</i> , 22 S.W.3d 497 (Tex. Crim. App. 2000) .....	12, 13, 14, 15
<i>Patterson v. State</i> , 769 S.W.2d 938 (Tex. Crim. App. 1989) .....	10
<i>Pena Cortez v. State</i> , 732 S.W.2d 713 (Tex. App. –Corpus Christi-Edinburg 1987) .....	15
<i>Plummer v. State</i> , 410 S.W.3d 855 (Tex. Crim. App. 2013) .....	10, 11, 16
<i>Thomas v. State</i> , 821 S.W.2d 616, 620 (Tex. Crim. App. 1991) .....	15
<i>Tisdale v. State</i> , 686 S.W.2d 110 (Tex. Crim. App. 1984) .....	14
<i>Whatley v. State</i> , 946 S.W.2d 73 (Tex. Crim. App. 1997) .....	16
<i>Williams v. State</i> , 575 S.W.2d 30 (Tex. Crim. App. 1979) .....	14

### State Statutes:

Tex. Pen. Code Ann. § 1.07(a)(17)(B) (West) .....	13, 14
Tex. Pen. Code Ann. § 1.07(a)(46) (West) .....	13
Tex. Pen. Code Ann. § 29.03(a)(2) (West) .....	12, 15

**NO. PD-0064-20**

**IN THE  
COURT OF CRIMINAL APPEALS  
AUSTIN, TEXAS**

---

**JUAN CARLOS FLORES, Appellant**

**v.**

**THE STATE OF TEXAS, Appellee**

---

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW THE STATE OF TEXAS, hereinafter referred to as the State, and submits this brief pursuant to the Texas Rules of Appellate Procedure and would show through her attorney the following:

**STATEMENT REGARDING ORAL ARGUMENT**

The State waives oral argument; however, if this Court determines that oral argument would be helpful in this case the State would request the opportunity to present argument to this Court.

## **STATEMENT OF THE CASE**

The appellant was charged with, and a jury convicted him of, Aggravated Robbery. The trial court assessed punishment at fifteen years imprisonment.

## **STATEMENT OF PROCEDURAL HISTORY**

The appellant was indicted on February 21, 2018. The appellant was charged with Aggravated Robbery, alleging the use of a deadly weapon while in the course of committing theft of property. The alleged deadly weapon was a drill.

On December 17, 2018, the appellant, having been convicted by a jury, was sentenced by the trial court to 15 years in prison.

The appellant filed his notice of appeal on June 3, 2019. Oral argument was requested and this case was set for submission in cause number 05-19-00034-CR on November 13, 2019. The conviction was affirmed on all grounds on December 19, 2019.

The appellant filed his Petition for Discretionary Review on February 12, 2020. Review was granted on June 24, 2020.

The appellant's brief was filed on August 11, 2020. The State's brief is due September 10, 2020.

## **ISSUES PRESENTED**

### RESPONSE POINT 1:

THE APPELLATE COURT DID NOT ERR IN FINDING THE EVIDENCE SUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT THE WEAPON USED OR EXHIBITED IN THIS CASE WAS A DEADLY WEAPON.

## **SUMMARY OF ARGUMENT**

In his sole point of error, the appellant challenges the decision by the Fifth Court of Appeals in this case and alleges that the evidence at trial was insufficient to prove the appellant “intended the use of the drill in a way which it would be capable of causing death or serious bodily injury.” The appellant alleges that pursuant to *McCain v. State*, while “the deadly weapon statute does not require the actor actually intend death or serious bodily injury, sufficient evidence of a deadly weapon does require proof the actor intends a use of the object in which it would be capable of causing death or serious bodily injury.”

The Fifth Court rejected the appellant's argument, reasoning that a “defendant uses a deadly weapon during the commission of the offense when the weapon is employed or utilized to achieve its purpose.” The court correctly held that “[t]o exhibit a deadly weapon, the weapon need only be consciously displayed during the commission of the offense” and that “[i]n the context of violent offenses, if a person exhibits a deadly weapon, without overtly using it to harm or threaten while committing a felony, the deadly weapon still provides intimidation value that assists the commission of the felony.”

The only element of aggravated robbery at issue on direct appeal was whether the appellant “use[d] or exhibit[ed] a deadly weapon.” The Fifth Court of Appeals, after viewing the evidence in the light most favorable to the verdict, and determining that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, affirmed the conviction. The court stated that a deadly weapon finding for a felony offense must be based on proof that the weapon, if not a *per se* a weapon, was capable of causing death or serious bodily injury *and* must contain proof of some facilitation by the weapon of the commission of the felony.

The record clearly reflected that the drill was “capable” of causing death or serious bodily injury. The record clearly reflected that the drill was

used and exhibited by the appellant to accomplish the associated robbery by intimidating the victim.

For legal sufficiency purposes, the question was whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” The appellate court did not err when it ruled that the evidence was sufficient for the jury to find that the drill brandished by the appellant was used or exhibited during the robbery and was capable of causing death or serious bodily injury.

## **ARGUMENT**

### **RESPONSE POINT 1:**

**THE APPELLATE COURT DID NOT ERR IN FINDING THE EVIDENCE SUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT THE WEAPON USED OR EXHIBITED IN THIS CASE WAS A DEADLY WEAPON.**

In his sole point of error, the appellant challenges the ruling by the Fifth Court of Appeals and alleges that the evidence in this case was insufficient to prove the appellant “intended the use of the drill in a way which it would be capable of causing death or serious bodily injury.”

(Appellant's PDR Brief, p. 6) The appellant alleges that pursuant to *McCain v. State*, while "the deadly weapon statute does not require the actor actually intend death or serious bodily injury, sufficient evidence of a deadly weapon does require proof the actor intends a use of the object in which it would be capable of causing death or serious bodily injury." (Appellant's PDR Brief, pp. 6-7) The appellant is wrong.

### **A. FACTS ADDUCED AT TRIAL**

On September 4, 2017, Nanu Shapakota was working at a convenience store she owned with her husband. (RR vol. 4, p. 126) Around 8:30 p.m., she heard someone enter. (RR vol. 4, pp. 126-127) She turned around and saw a man with his face covered holding what she thought was a gun. Shapakota was scared and started shaking. (RR vol. 4, p. 127) The man told her she had one minute to put all the money from the register in a bag. (RR vol. 4, p. 128) She felt threatened and was afraid he would hurt her if she failed to comply. (RR vol. 4, pp. 131-132) She immediately pulled all the money from the register and put it in the bag. (RR vol. 4, p. 128) The man then ordered her to the restroom so he could leave. She obeyed, the appellant left, and Mrs. Shapakota immediately called 911.

(RR vol. 4, p. 128)

Sergeant Brian Conrad responded to the call. (RR vol. 4, p. 142) He watched the surveillance video and noted the appellant arrived and left the store in a silver Tahoe. (RR vol. 4, p. 144) From the video, it was determined the “gun” was a drill. (RR vol. 4, pp. 146, 154)

The police released the surveillance video on Facebook. (RR vol. 5, pp. 12-13, 15) Three people saw the video, recognized the appellant, and called police. (RR vol. 5, pp. 15-16, 18, 57-58) Officer Kyle Mackay returned the call and gathered information, which included an address. (RR vol. 5, p. 18) Officer Mackay went to the address provided. When he pulled up, he immediately saw a silver Tahoe. (RR vol. 5, p. 20) Based on the surveillance video, he believed it was the same vehicle. (RR vol. 5, pp. 20-31)

Officer Mackay knocked on the front door and the appellant's wife, Isabel Flores, answered. (RR vol. 5, p. 31) She told him the appellant was at work. (RR vol. 5, pp. 31-32) She gave consent to search the Tahoe, but Officer Mackay did not recover any evidence. (RR vol. 5, p. 38) He left his card with Mrs. Flores and instructions for the appellant to call him. (RR vol. 5, p. 39)

After a few days passed and the appellant did not call, Officer Mackay

returned to the home. (RR vol. 5, p. 40) Mrs. Flores said the appellant left for Florida, but she invited Officer Mackay inside the home. (RR vol. 5, pp. 41-42) Inside a bedroom, Officer Mackay saw a cordless drill with a long bit attached sitting on a bookshelf in plain view. (RR vol. 5, p. 44) Next to the bookshelf on the ground was a ripped plastic bag matching the color of the bag in the surveillance video. (RR vol. 5, p. 45) He also noticed a plastic bag on the floor of the open closet. (RR vol. 5, p. 45) Officer Mackay believed the drill and plastic bags were connected to the robbery. (RR vol. 5, pp. 44-45, 53-56) He seized the evidence. (RR vol. 5, p. 47)

## **B. RULING BY THE FIFTH COURT OF APPEALS**

The Fifth Court of Appeals found that the appellant did not dispute whether a drill was capable of causing death or serious bodily injury, but argued that under the facts in his case, the evidence was insufficient to find the drill “in its use or intended use was capable of causing death or serious bodily injury.” *Flores v. State*, 05-19-00034-CR, 2019 WL 6907076, at \*2 (Tex. App.—Dallas Dec. 19, 2019, pet. granted) He asserted that “whether the drill *could have been* used to strike or puncture the store clerk was not the relevant inquiry.” *Flores*, 2019 WL 6907076, at \*2. The appellant

contended that the evidence should be reviewed “to determine whether the appellant *actually* used the drill in such a way that it was capable of causing death or serious bodily injury.” *Flores*, 2019 WL 6907076, at \*2. The appellant argued that because the appellant “pointed the drill like a gun, but did not strike Shapakota or raise the drill as if to strike... no evidence exist[ed] to support the aggravating element.” *Flores*, 2019 WL 6907076, at \*2.

The Fifth Court rejected the appellant's argument, reasoning that a “defendant uses a deadly weapon during the commission of the offense when the weapon is employed or utilized to achieve its purpose.” *Flores*, 2019 WL 6907076, at \*2. Citing *Plummer v. State*, 410 S.W.3d 855 (Tex. Crim. App. 2013) and *Patterson v. State*, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989), the court found that use of a deadly weapon refers to the wielding of a firearm with effect, but also extends to any employment of a deadly weapon, even its simple possession, if such possession facilitates the associated felony. *Flores*, 2019 WL 6907076, at \*2. The court correctly held that “[t]o exhibit a deadly weapon, the weapon need only be consciously displayed during the commission of the offense.” *Flores*, 2019 WL 6907076, at \*2 (citing *Patterson*, 769 S.W.2d at 941). The Fifth Court also correctly stated that “[i]n the context of violent offenses, if a person

exhibits a deadly weapon, without overtly using it to harm or threaten while committing a felony, the deadly weapon still provides intimidation value that assists the commission of the felony.” *Flores*, 2019 WL 6907076, at \*2 (citing *Plummer*, 410 S.W.3d at 862).

The Fifth Court ruled that

[h]ere, although appellant did not use the drill to overtly harm Shapakota, he certainly used it for intimidation value to accomplish the crime. Shapakota testified appellant held and pointed the drill at her like a gun. She was afraid appellant was going to use it to hurt her. The jury watched the surveillance video in which his threat is audible and the weapon is visible. Sergeant Conrad testified a drill is a deadly weapon because the sheer weight could bludgeon someone to death or a drill bit could stab someone. Thus, appellant used and exhibited the drill in such a way that it was capable of causing death or serious bodily injury, and he used it to facilitate the robbery. See *Plummer v. State*, 410 S.W.3d at 865 (deadly weapon finding must contain some facilitation connection between the weapon and the felony); see also *Adame v. State*, 69 S.W.3d 581, 582 (Tex. Crim. App. 2002) (“In proving use of a deadly weapon other than a deadly weapon *per se*, the State need show only that the weapon used was capable of causing serious bodily injury or death in its use or intended use.”).

*Flores*, 2019 WL 6907076, at \*2.

The Fifth Court of Appeals, after viewing the evidence in the light most favorable to the prosecution and determining that any rational trier of fact could have found beyond a reasonable doubt that the appellant used or exhibited a deadly weapon during the commission of the offense, overruled this issue. *Flores*, 2019 WL 6907076, at \*2.

### **C. SUFFICIENCY OF THE EVIDENCE REGARDING A DEADLY WEAPON FINDING UNDER *MCCAIN***

In *McCain v. State*, 22 S.W.3d 497 (Tex. Crim. App. 2000), the evidence showed that the “home invasion” defendant had a long, dark object sticking from his back pocket, which the homeowner-victim thought was a knife. The victim was afraid that the defendant would use the knife against her during the aggravated robbery even though he never brandished it in a threatening manner. *Id.* at 499. The defendant, who had kicked in the complainant's kitchen door and beat her with his fists, was charged with aggravated robbery based on the use or exhibition of a butcher knife. See Tex. Pen. Code Ann. § 29.03(a)(2)(West). This court noted the similarity between the language in that provision and in Article 42.12 § 3g(a)(2) and applied the *Patterson* interpretation of “use and exhibit.” *Id.* at 502. This court upheld the deadly-weapon finding in *McCain* because “the knife was exhibited during the criminal transaction, or at least, that its presence was used by appellant to instill in the complainant apprehension, reducing the likelihood of resistance during the encounter.” *Id.* at 503. The defendant's act of having the knife in his pocket while he committed the felony was not sufficient to find that the knife was a deadly weapon, but “the determining factor [was] that the deadly weapon was

‘used’ in facilitating the underlying crime.” *Id.*

A deadly weapon is defined as “a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury” or “anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.” Tex. Pen. Code Ann. § 1.07(a)(17)(West); *McCain*, 22 S.W.3d 497. “Serious bodily injury” is defined as “bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” Tex. Pen. Code Ann. § 1.07(a)(46).

In determining whether a weapon is deadly in its manner of use or intended manner of use, the defendant need not have actually inflicted harm on the victim. See *Brown v. State*, 716 S.W.2d 939, 946 (Tex. Crim. App. 1986). Instead, the courts consider words and other threatening actions by the defendant, including the defendant's proximity to the victim; the weapon's ability to inflict serious bodily injury or death, including the size, shape, and sharpness of the weapon; and the manner in which the defendant used the weapon. See *Tisdale v. State*, 686 S.W.2d 110, 115 (Tex. Crim. App. 1984) (op. on reh'g) (physical proximity); *Blain v. State*, 647 S.W.2d 293, 294 (Tex. Crim. App. 1983) (size, shape, and sharpness of

the weapon; ability of the weapon to inflict death or serious injury; and the manner in which the defendant used the weapon); *Williams v. State*, 575 S.W.2d 30, 32 (Tex. Crim. App. 1979) (threats or words). These, however, are just factors used to guide a court's sufficiency analysis; they are not inexorable commands. *Johnson v. State*, 509 S.W.3d 320, 322–23 (Tex. Crim. App. 2017).

The penal code provision's plain language does not require that the actor actually *intend* death or serious bodily injury, actually *cause* death or serious bodily injury, or *attempt to cause* death or serious bodily injury. Tex. Pen. Code Ann. § 1.07(a)(17)(B). An object is a deadly weapon if the actor intends a use of the object in which it would be *capable* of causing death or serious bodily injury. The placement of the word “capable” in the provision enables the statute to cover conduct that threatens deadly force, even if the actor has no intention of actually using deadly force, does not actually cause death or serious bodily injury, or even attempted to cause death or serious bodily injury. See *McCain*, 22 S.W.3d at 503 (citing *Tisdale*, 686 S.W.2d at 114–15); see *Bailey v. State*, 38 S.W.3d 157, 158–59 (Tex. Crim. App. 2001) (quoting *McCain* ).

The *McCain* court also explained that the language in its earlier

*Thomas*<sup>1</sup> opinion—stating that certain objects are not deadly weapons “unless actually used or intended to be used in such a way as to cause death or serious bodily injury” was “somewhat misleading” in that it made a “short-hand reference to subsection (B)’s requirement while the Court focused upon the applicability of subsection (A).” *McCain*, 22 S.W.3d at 503.<sup>2</sup>

#### **D. APPELLATE COURT PROPERLY APPLIED *MCCAIN* IN THIS CASE**

The only element of aggravated robbery at issue on direct appeal was whether the appellant “use[d] or exhibit[ed] a deadly weapon.” Tex. Pen. Code Ann. § 29.03(a)(2). To meet its burden at trial, the State was required to prove that the drill the appellant had was a deadly weapon as defined by statute and that, if it was, he also used or exhibited the drill while committing robbery. On appeal, the appellate court had to find that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, including the finding of a deadly weapon, to affirm the

---

<sup>1</sup>*Thomas v. State*, 821 S.W.2d 616, 620 (Tex. Crim. App. 1991).

<sup>2</sup>The appellant cites *Hernandez v. State*, 332 S.W.3d 664 (Tex. App. – Texarkana 2010, no pet.), and *Pena Cortez v. State*, 732 S.W.2d 713 (Tex. App. –Corpus Christi-Edinburg 1987, no pet.), to support his argument. Neither of these two lower court rulings mention or address the *McCain* holding and are not sufficient to overturn precedent from this court.

conviction.

This court has upheld the deadly-weapon finding in the past because “[a]ny employment of a deadly weapon qualified if it ‘facilitates the associated felony.’ ” *Whatley v. State*, 946 S.W.2d 73 (Tex. Crim. App. 1997). In *Whatley*, a solicitation-of-capital-murder prosecution, the defendant had solicited hitmen and provided them with a pistol with which they were to commit the murder. *Id.* at 76. Mere exhibition of the pistol supported a deadly-weapon finding only because the pistol facilitated the associated felony by its “persuasive impact ... [as] a part of the request or the attempt to induce conduct,” enhancing the defendant's solicitation request. *Id.*; *Plummer*, 410 S.W.3d at 860–61

Here, the record clearly reflected that the drill was “capable” of causing death or serious bodily injury. The appellant threatened to “hurt” the victim in this case while brandishing a hand-held drill covered in a plastic bag. (RR vol. 4, pp. 146, 148; vol. 5, pp. 44-45) Sergeant Brian Conrad, with the Denison Police Department, testified that a drill was a deadly weapon because it could be used to bludgeon a person, stab a person, or “drill” a person, and could cause death or seriously bodily injury. (RR vol. 4, pp. 147-148) Detective Kyle Mackay, who found the drill in the appellant’s residence, also testified that the drill was capable of causing

death or serious bodily injury either as a blunt object, to stab a person, or to “drill” a person. (RR vol. 5, pp. 48-49)

The remaining question for the appellate court, was only whether the evidence was sufficient to prove that the drill was “used or exhibited” during the criminal transaction. It was. The record reflects that the appellant made threats to the victim while holding the drill, pointed the drill at the victim, and shook the drill. (RR vol. 4, pp. 127- 129; vol. 5, p. 81; SX 1) The deadly weapon was clearly displayed in a manner intended to place the victim in fear to facilitate the robbery. (RR vol. 5, p. 88; SX 1) The appellate court properly held that the evidence was sufficient to find that the drill aided the appellant in accomplishing the associated felony by intimidating Ms. Shapakota even though it was not overtly used.

For legal sufficiency purposes, the question was only whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson*, 443 U.S. at 319 (emphasis in original). Following the reasoning in *McCain*, the Fifth Court of Appeals properly held that the drill was capable of causing death or serious bodily injury and that the drill was used and exhibited to facilitate the robbery of Ms. Shapakota, even if the appellant did not injure or attempt to injure her.

The appellant carried the drill with him, waved it around during the robbery, and demanded that Ms. Shapakota give him the money from the cash register. The appellant did not carry the drill in with him in order to do repair work and then incidentally committed robbery. The appellant brought with him a heavy item capable of bludgeoning a person, puncturing a person, or “drilling” a person and causing serious bodily injury or death. The appellant used that item to threaten and frighten Ms. Shapakota into complying with his demand for money. The appellate court did not err when it ruled that the evidence was sufficient for the jury to find that the drill brandished by the appellant was used or exhibited during the robbery and was capable of causing death or serious bodily injury.

### **PRAYER**

WHEREFORE, the state respectfully prays this court affirm the judgment and conviction herein.

Respectfully Submitted,  
J. BRETT SMITH  
CRIMINAL DISTRICT ATTORNEY

/s/ Karla Baugh

KARLA BAUGH

ASSISTANT CRIMINAL DISTRICT ATTORNEY  
GRAYSON COUNTY, TEXAS  
200 S. CROCKETT ST.  
SHERMAN, TX 75090  
903/813-4361  
903/892-9933 (fax)  
*baughk@co.grayson.tx.us* (email)  
TEXAS BAR NO. 01923400

ATTORNEY FOR THE STATE

### **CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing Motion  
was eserved, faxed or mailed to:

JEROMIE ONEY  
BAR NO. 24042248

P.O. BOX 2040  
GAINESVILLE, TX 7241

940/665-6300  
FAX: 940/665-6301

*jeromie.oney@thesolawfirm.com*

attorney of record for the Appellant, in accordance of the Rules of Appellate  
Procedure, on AUGUST 14, 2020.

/s/ Karla Baugh

---

KARLA BAUGH  
ASSISTANT CRIMINAL DISTRICT ATTORNEY  
GRAYSON COUNTY, TEXAS  
200 S. CROCKETT ST.  
SHERMAN, TX 75090  
903/813-4361  
903/892-9933 (fax)  
*baughk@co.grayson.tx.us* (email)  
TEXAS BAR NO. 01923400

## STATE'S CERTIFICATE OF COMPLIANCE

I certify that this document complies with the typeface and word limit requirements of the Texas Rules of Appellate Procedure. This document contains 3,577 words, exclusive of the caption, the identity of parties and counsel, the statement regarding oral argument, the table of contents, the index of authorities, the statement of the case, the statement of issues presented, the statement of jurisdiction, the statement of procedural history, the signature, the proof of service, the certification, the certificate of compliance, and the appendix.

/s/ Karla Baugh

AUGUST 14, 2020

date

KARLA BAUGH  
ASSISTANT CRIMINAL DISTRICT ATTORNEY  
GRAYSON COUNTY, TEXAS  
200 S. CROCKETT ST.  
SHERMAN, TX 75090  
903/813-4361  
903/892-9933 (fax)  
*baughk@co.grayson.tx.us* (email)  
TEXAS BAR NO. 01923400

### **Automated Certificate of eService**

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

KARLA BAUGH

Bar No. 1923400

baughk@co.grayson.tx.us

Envelope ID: 45389750

Status as of 08/14/2020 12:57:38 PM -05:00

#### Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Karla Baugh	1923400	baughk@co.grayson.tx.us	8/14/2020 11:27:36 AM	SENT
Stacey Soule	24031632	information@spa.texas.gov	8/14/2020 11:27:36 AM	SENT

Associated Case Party: JuanCarlosFlores

Name	BarNumber	Email	TimestampSubmitted	Status
JEROMIE ONEY		jeromie.oney@thesolawfirm.com	8/14/2020 11:27:36 AM	SENT